

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 12.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.777 of 1995

1. Raju @ Rajagopal (died)
2. Abrannji Ammal
3. R.Manjini
4. R.Muralidharan
5. R.Vijaya
6. R.Santhanam
7. Kasthuri
8. Vasantha

Appellants 2 to 8 are brought on record as LRs. Of the deceased sole appellant vide order of Court dated 09.03.07 made in C.M.P.No. 17455 of 2003

... Appellants

Vs.

Kamalasaraswathy

... Respondent

PRAYER: Second Appeal against the Judgment and decree dated 06.12.1994 and made in A.S.No.116 of 1991 on the file of Principal District Judge at Pondicherry, confirming the judgement and decree dated 30.04.1991 and made in O.S.No.21 of 1988 on the file of Additional Subordinate Judge at Pondicherry.

For Appellants 2 to 8 : M/s Emoly Venkataeshan for
Mr.T.R.Rajaraman
For Respondent : Mrs.R.Meenal

J U D G M E N T

The unsuccessful defendant in both the Courts below is the appellant. Pending appeal the sole appellant died and his L.Rs. have been brought on record as appellant 2 to 8. The respondents have filed the suit for declaration of title and also recovery of possession along with mesne profits in respect of the suit property, which is to the extent of 6 Acres and 68 cents along with the house and garden at Neelaganda Chettiyar garden in resurvey No.241/102, 241/103 and 241/105 at Periyakalapet Village, Oulgaret commune, Pondicherry District, on the basis that the suit property originally belonged to her maternal grandfather, namely, Manjanee Gounder. The said Manjanee Gounder who is admittedly one of the

sons of Rathinasamy Gounder died leaving behind him his two daughters Kanagammal and Janakiammal, out of whom the said Kanagammal's daughter is the plaintiff.

2. It is the case of the plaintiff that between Janakiammal and Kanagammal there was a partition on 11.05.1959 marked as Ex.A.4 under which the suit item was allotted to the share of the plaintiff's mother Kangammal along with other items and she was in possession. The said Kanagammal has executed a usufructuary mortgage in favour of one Loganathan on 01.06.1960 marked as Ex.A.8 and on receipt of Rs.1400/- he was put in possession. The said Loganathan who was trusted by the mother of the plaintiff, appears to have been dispossessed from the property by Ramu alais Rajagopal who is the defendant in collusion. Having given possession the said Loganathan, mortgagee has filed a suit in O.S.No.366 of 1972 for a declaration that he is a mortgagee, which was dismissed and the appeal filed by him in A.S.No.56 of 1974 also was dismissed on the basis that Loganathan as the mortgagee can only claim the mortgage money and not anything, since he has failed to prove his possession.

3. The judgements in the said suit in O.S.No.366 of 1972 and A.S.No.56 of 1975 were marked as Ex.B2 to B5. The plaintiff's mother Kanagammal filed O.S.No.120 of 1983 for redemption. In the mean time since the said Kanagammal also died. Based on a direction of the Civil Court in O.S.No.120 of 1983 marked as Ex.A9 and A.10 stating that the plaintiff's mother can file a suit separately to seek declaration in respect of the suit property the present suit for declaration and possession is filed.

4. The defendant who is stated to have obtained possession from the mortgagee of Kanagammal, namely, Loganathan is the son of Boopalan Gounder who is the brother of Manjaneer Gounder, namely, the father of Kanagammal and another son of Rathinasamy Gounder the original owner, who has executed a partition deed dated 28.08.1928 marked as Ex.A.2 by which the suit property has gone to Manjaneer Gounder's share. The defendant has raised the issue that the suit is not maintainable, since there is no cause of action and has also raised the point of res judicata on the basis that the earlier suit filed by the plaintiff's mother Kanagammal in O.S.No.120 of 1983 is binding upon the plaintiff. That apart the competency of the suit is also questioned based on Order 2 Rule 2 of Code of Civil Procedure. It is also the case of the defendant that Manjaneer Gounder is not at all the owner of the property and partition is not true and plaintiff is not in possession. He would also submit that the mortgagee under Kanagammal, namely, Loganathan has not proved that he was put in possession and it was in view of the said fact, it was held earlier that he can only claim the mortgage amount. It is also seen that the plaintiff's claim is based on a will executed by Kanagammal on 17.12.1982, the photo copy of which is marked as Ex.A.13.

5. It was considering the entire evidence and documents the Trial Court has decreed the suit against which the defendant has filed First Appeal in A.S.No.116 of 1991, the Appellate Court finding all the issues against the defendant has dismissed the Appeal, as against which the defendant has filed the above Second Appeal.

6. While admitting the Second Appeal this Court has framed the following questions of law:

"1. When it is established through the judgements of the civil court that the appellant is in possession for over a period of 60 years still is the learned Principal District Judge, right in negating the plea of adverse possession pleaded by the defendant?

2) Is not the suit barred by the principles of res judicata?"

7. The question to be decided in this case is as to whether the defendant has established the continuous possession for 60 years and in such circumstances can he be entitled for adverse possession and also as to whether the suit is barred by the principles of res judicata by virtue of the judgement in O.S.No.120 of 1983 which was filed by the mother of the plaintiff Kanagammal. As correctly found by both the Courts below, in respect of plea of res judicata raised by the defendant, the suit in O.S.No.120 of 1983 which was filed by the plaintiff's mother Kanagammal in which the defendant in this suit was arrayed at 13th defendant and by making Loganathan as one of the defendants for redemption of mortgage and it was decided in the said suit, the judgement of which was marked as Ex.A.10 while dealing with the claim of the defendant herein that he has been in possession and title for long time and entitled for ownership of the property stating that the said issue is left to be decided in a separate suit according to law. Further a direction was also given in respect of the plaintiff in the suit and also to workout her remedy by filing a different suit based on which the present suit was filed.

8. In fact the learned First Appellate Judge has extracted the portion of the decree in Ex.A9 in O.S.No.120 of 1983 wherein in class No.5 has stated as follows:

"that it is further ordered and decreed that the claim for item No.2 (suit property) by defendant 13 (defendant in this suit who is the appellant) is hereby left to be decided in a separate suit according to law."

Therefore, there was no decision about the ownership or adverse possession claimed by the defendant in the said suit and as correctly found by the Courts below the question of res judicata does not arise.

9. As rightly contended by the learned counsel for the respondent

for the purpose of claiming res judicata the four conditions are stipulated by the Hon'ble Supreme Court in the judgement in Mahboob Sahab Vs. Syed Ismail reported in AIR 1995 SC 1205 as follows:

"8. Under these circumstances the question emerges whether the High Court was right in reversing the appellant decree on the doctrine of res judicata. At this juncture it may be relevant to mention that the trial court negatived the plea of res judicata as a preliminary issue. Though it was open to sustain the trial court decree on the basis of the doctrine of res judicata, it was not argued before the appellate court on its basis. Thereby the findings of the trial court that the decree in O.S.No.3/1/1951 does not operate as a res judicata became final. The question then is whether the doctrine of res judicata stands attracted to the facts in this case. It is true under S.11, C.P.C. when the matter has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claimed litigating under the same title, the decree in the former suit would be res judicata between the plaintiff and the defendant or as between the co-plaintiff or co-defendant. But for application of this doctrine between co-defendants four conditions must be satisfied, namely, that (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims; (3) the question between the defendants must have been finally decided; and (4) the co-defendants were necessary or proper parties in the former suit. This is the settled law as held in S.M.Sadat Ali Khan Vs. Mirza Wiquar Ali, AIR 1943 PC 115; Shashibushan Prasad Mishra Vs. Babuji Raj, (1969)2 CR 9711 (AIR 1970 SC 809); and Iftikhar Ahmed Vs. Syed Meharban Ali, (1974)2 SCC 151; (AIR 1974 SC 749). Take for instance that if in a suit by 'A' against 'B' & 'C', the matter is directly and substantially in issue between B & C, and an adjudication upon that matter was necessary to determine the suit to grant relief to 'A'; the adjudication would operate as res judicata in a subsequent suit between B & C in which either of them is plaintiff and the other defendant. In other words, if a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide the case, and the co-defendants will be bound by the decree. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other."

10. In respect of the plea of adverse possession it is the finding of the Courts below that it was the specific case of the defendant in the written statement that Manjanee Gounder is the maternal grandfather of the

plaintiff, who was not at all having title over the property and therefore, Kanagammal was not in possession and on the other hand stating that the defendant's father Boopalan Gounder had been in continuous possession but has not chosen to plea as to from which period the possession started, since as per the law in existence 30 years uninterrupted possession has to be proved adversely against the owner.

11. On the other hand the Courts below found that the plaintiff has a right of title over the property under Ex.A.1 to A.4 and both the courts have correctly come to the conclusion that the defendant has not proved his claim of adverse possession as per his pleading especially in the circumstances that Manjanaee Gounder who is the maternal grandfather of the plaintiff has got the property under Ex.A.2 by partition on 29.08.1928 and the plaintiff's mother Kanagammal has executed a usufructuary mortgage deed in favour of Loganathan under Ex.A.8 on 01.06.1960 and the present suit was filed in the year 1988 and therefore there was no question of proof by the plaintiff of adverse possession. It is further relevant to point out that the defendant himself has not chosen to challenge the judgement in O.S.No.120 of 1983 marked as Ex.A.10 under which both the plaintiff Kanagammal as well as the defendant herein who was the 13th defendant have been directed to workout their remedy by a properly instituted suit based on which of course Kanagammal has filed the present suit, while the defendant has not proceeded further and therefore, the judgement in O.S.No.120 of 1983 is final as far as he is concerned.

12. In view of the above said facts, there is no substantial question of law involved in this case and therefore, the Second Appeal fails and the same is dismissed with cost.

nbj

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. THE PRINCIPAL DISTRICT, JUDGE

PONDICHERRY

2. THE ADDITIONAL SUBORDINATE

JUDGE, PONDICHERRY

3. THE RECORD KEEPER

V.R. SECTION, HIGH COURT, CHENNAI.

+ One cc to Mr. R. Subramanian, Advocate sR 24010

JRG (co)

sg 28/5/07

Order in
S.A.No.777 of 1995
12.4.2007